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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

MARIAFELISSA SMITH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DAVID D. SALMON
Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6217
Fax: (415) 356-6024
Counsel for Petitioner

30 pp

QUESTION PRESENTED

Did *Oregon v. Elstad*, 470 U.S. 298 (1984), overrule or limit the exclusionary rule of *Harrison v. United States*, 392 U.S. 219 (1968), to the extent that *Harrison* presumes that a defendant's voluntary trial testimony is the "fruit" of a *Miranda* or other nonconstitutional violation?

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OPINION OR JUDGMENT BELOW

The decision of the California Court of Appeal was not published. Copies of the decision and of the modification made upon denial of rehearing are contained in the Appendix.

STATEMENT OF JURISDICTION

The California Court of Appeal issued its decision on July 3, 1997. Our petition for rehearing raising the harmless error question herein was filed July 17, 1997. On August 4, 1997, the court denied rehearing, but modified its opinion to reject our harmless error argument. Our petition for review by the California Supreme Court was filed August 12, 1997, and denied October 15, 1997. On October 22, 1997, we moved to stay issuance of the remittitur pending filing a petition for writ of certiorari, stating we expected to file the petition within 45 days. The stay of remittitur was granted by the California Court of Appeal on November 3, 1997.

This Court has jurisdiction under 28 U.S.C. section 1257(a).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Fifth Amendment of the Constitution of the United States provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

Facts. The defendant was convicted of the second degree murder of her newborn child and sentenced to a term of 15 years to life. She gave birth while sitting on the toilet. Defendant told the police and testified at trial that she heard a gurgle, saw that the baby's mouth and nose were beneath the water, but closed the lid and took a shower. She later put the body in a trash bag on her balcony, and carried on for several days as though nothing had occurred. Expert evidence established that the boy was alive at birth. The defendant denied she intended to kill the baby, which she had hoped would be stillborn. She had not realized she was pregnant until shortly before the birth, had not wanted the child, and did not think she could handle another child emotionally, physically, or financially. Defendant was very intoxicated by methamphetamine during the birth. In her condition, her expert testified, she would not have been able to make sound judgments or to cope with reality.

Ruling. The California Court of Appeal reversed the conviction for want of a *Miranda* admonition because, despite repeated assurances by police officers that she was

not under arrest, that she was free to leave the police station, and that she did not have to talk to the officers, a reasonable person would not have felt free to leave when she gave her incriminating pretrial statement.[1] In determining that the error in admitting the defendant's pretrial statement was not harmless beyond a reasonable doubt, the court of appeal refused to consider the defendant's voluntary trial testimony, which reiterated the key incriminating facts.

Federal question. The State petitioned for rehearing, arguing that under *Oregon v. Elstad*, 470 U.S. 298 (1984), the failure of the police to give *Miranda* warnings before defendant's voluntary pretrial statement did not "taint" her subsequent trial testimony, given with awareness of her Fifth Amendment privilege. We argued that *Elstad* had implicitly overruled or limited *Harrison v. United States*, 392 U.S. 219 (1968), when it rejected application of the "fruit of the poisonous tree" doctrine in the *Miranda* context.

The court of appeal rejected it on its merits, declaring itself bound by *People v. Boyer*, 48 Cal. 3d 247, 280, 768 P.2d 610, *cert. denied*, 493 U.S. 975 (1989), and *People v. Esqueda*, 17 Cal. App. 4th 1450, 1487, 22 Cal. Rptr. 2d 126 (1993), to assume that defendant would not have testified had the inadmissible statement been suppressed. It described *Elstad* and *Harrison* as "consistent with the rule in California." (Order Modifying Opn., App. at 37 n.1.)

The California Supreme Court denied review on October 15, 1997.

No independent state ground. The rule relied upon by the court of appeal traces to *People v. Spencer*, 66 Cal.

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1. The court of appeal relied mainly on the fact that the defendant had been in the constant company of an officer or cadet (as required under police department rules for all "civilians" inside the station) for seven and a half hours before being interviewed.

2d 158, 163-64, 424 P.2d 715 (1967), a case later relied upon in *Harrison*, 392 U.S. at 223. Although California's expression of the rule thus predates *Harrison*, the California Supreme Court has since made clear that "whenever a confession admitted in a California trial has been obtained by means that render the confession inadmissible under the federal Constitution, the prejudicial effect of the confession must be determined under the federal standard." *People v. Cahill*, 5 Cal. 4th 478, 510, 853 P.2d 1037, 1059 (1993); *see People v. Bradford*, 14 Cal. 4th 1005, 929 P.2d 544 (applying federal standards to admissibility of later statements following initial un*Mirandized* statement), *cert. denied*, 66 U.S.L.W. 3323 (1997).

In addition, the California Supreme Court has held in the *Miranda* context that any state exclusionary rule was abrogated by the adoption of section 28(d), article I, of the California Constitution in 1982, leaving no basis for exclusion on independent state grounds. *People v. Markham*, 49 Cal. 3d 63, 71, 775 P.2d 1042 (1989); *People v. May*, 44 Cal. 3d 309, 318, 748 P.2d 307 (1988). *See also Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

ARGUMENT

A DEFENDANT'S VOLUNTARY TRIAL TESTIMONY IS NOT "FRUIT" OF AN ERRONEOUS ADMISSION OF A VOLUNTARY BUT UN*MIRANDIZED* STATEMENT.

Because the California Court of Appeal did not consider itself free to consider the defendant's trial testimony in determining whether error in admitting an un*Mirandized* statement was harmless, the second degree murder conviction of a drug-abusing mother who gave birth to her child into a toilet and allowed it to drown has been reversed.

This will follow despite the facts that (1) the interviewing officer believed the defendant was not in custody and *Miranda* did not yet apply; (2) he repeatedly advised the defendant she was not under arrest, she did not have to talk to him, and she was free to go; (3) the existence of "custody" is highly debatable in this case and was established only on appeal; (4) the defendant before trial told her story voluntarily and without coercion; and (5) she again voluntarily reiterated the same story in her trial testimony.

The issue ostensibly is one of harmless error, but prejudice turns on the admissibility in any retrial of the defendant's voluntary trial testimony, given after the erroneous admission of her equally voluntary, but un*Mirandized*, pretrial statement.

It thus also turns on the scope of the exclusionary rule of *Harrison v. United States*, 392 U.S. 219, which is expressed as a burden on the prosecution to show that testimony given by a defendant after the erroneous admission of an "unlawfully obtained" statement was not "impelled" by, or "fruit" of, that error.

This in turn depends on the Court's construction of *Oregon v. Elstad*, 470 U.S. 298, and its limitation of

Harrison to cases involving a violation of the Fifth Amendment, as distinct from violation of the prophylactic *Miranda* rules.

We stress the voluntariness of both the defendant's pretrial statement and her trial testimony, because we concede that admission of a coerced statement would violate the Fifth Amendment and trigger the *Harrison* exclusionary rule. It is the voluntariness of the defendant's statement and testimony that distinguishes this case from *Estelle v. Smith*, 451 U.S. 454 (1981), and brings it within *Elstad*.

Unfortunately, *Elstad*'s limitation of *Harrison* is not clear to all. The court of appeal in this case failed to perceive it, and indeed concluded that *Elstad* and *Harrison* supported its ruling. Several other courts have found *Elstad*'s impact upon *Harrison* to be uncertain, but have not had to reach the question presented by this case. *United States v. Pellulo*, 105 F.3d 117, 125 n.6 (3d Cir. 1997) (distinguishing *Harrison* by finding constitutional *Brady* violation); *Perri v. Director*, 817 F.2d 448, 450 n.2 (7th Cir.) (distinguishing *Harrison* by finding no evidence defendant was compelled to testify to refute his confession), *cert. denied*, 484 U.S. 843 (1987); *Kordenbrock v. Scroggy*, 889 F.2d 69, 79-80 & n.5 (6th Cir. 1989) (distinguishing *Harrison* by finding defendant adopted his prior confession and used it to support his defense), *vacated and rehearing en banc granted*, 896 F.2d 1457, *rev'd*, 919 F.2d 1091, 1098-99 (1990) (finding *Elstad* inapplicable because defendant did not claim testimony was "fruit" of the tainted confession, but gave a differing version at trial), *cert. denied*, 499 U.S. 970 (1991).

The issue is cleanly presented here.

We do not contest the California Court of Appeal's finding of custody.

There has not been, and we think there cannot be, any claim that the defendant's un*Mirandized* statement or her trial testimony was coerced or involuntary.

Similarly, the reliability of the un*Mirandized* pretrial statement and the defendant's substantially identical testimony is undisputed. The defendant's trial testimony essentially mirrored her pretrial statement. It, like her pretrial statement, acknowledged that she heard a "gurgle" as the baby was born into the toilet bowl, which caused her to stand up and look at the child for some moments before closing the lid. (RT 637, 641.)

There is little or no evidence apart from the defendant's trial testimony which would show the intent required for second degree murder, and render the admission of her un*Mirandized* pretrial statement harmless.

Hence, if *Elstad* means a defendant's voluntary trial testimony should not be treated as "fruit" of a failure to give *Miranda* admonitions, defendant's testimony will render harmless her erroneously admitted un*Mirandized* pretrial statement.[2/]

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2. The Court has held that the erroneous admission of a coerced confession is subject to harmless error analysis, *Arizona v. Fulminante*, 499 U.S. 279 (1991), and many lower courts have applied the same rule to admission of statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). *E.g., United States v. Mobley*, 40 F.3d 688, 694 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995); *United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993); *People v. Samayoa*, 15 Cal. 4th 795, 831, 938 P.2d 2, 50 (1997).

The Court has not yet reached the question, see *Berkemer v. McCarty*, 468 U.S. 420, 442-45 (1984), but since the Court has held the erroneous admission of a coerced confession is "trial error" subject to harmless error review, the erroneous admission of a voluntary but un*Mirandized* statement cannot logically be reversible per se. The reasons that led the Court not to reach the harmless error issue in *Berkemer v. McCarty* do not apply here: (1) the harmless error issue was presented to the California Court of Appeal and California Supreme Court, and decided on the merits by the court of appeal; (2) defendant's pretrial statement and trial testimony were essentially identical; and (3) defendant received a full trial resulting in conviction.

A. *Oregon v. Elstad* Left Unclear The Dispositive Principle In This Case.

Oregon v. Elstad, *supra*, 470 U.S. at 318, held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."

> Though *Miranda* requires that the unwarned admission must be suppressed, *the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.*

Id. at 309 (emphasis added).

The Court rejected an argument that the subsequent statement is the product of "a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag . . .":

> When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.
>
> . . . We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that

> the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Elstad, 470 U.S. at 312-13 (emphasis added).

Applying these rulings, the admissibility of defendant's trial testimony in any subsequent retrial, and thus its usability in assessing prejudice, turns on whether her trial testimony was knowingly and voluntarily given. There has not been and we think there cannot be any reasonable argument that it was not.

However, the Court then said,

> If the prosecution has *actually violated the defendant's Fifth Amendment rights* by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison v. United States*, 392 U.S. 219 (1968), precludes use of that testimony on retrial. "Having 'released the spring' by using the petitioner's *unlawfully obtained confessions* against him, the Government must show that its illegal action did not induce his testimony." *Id.*, at 224-225.

Elstad, 470 U.S. at 316-17 (emphasis added).

Given the preceding context in which the Court had distinguished violations of the "prophylactic" *Miranda* rules from violations of the Fifth Amendment privilege itself by coercion of involuntary statements, the Court's description of *Harrison* as applicable when the prosecution "*actually violated the defendant's Fifth Amendment rights*" indicates the Court intended to limit *Harrison* to circumstances where a coerced or involuntary statement or confession has been admitted in evidence.

If this construction of *Elstad* is correct, the defendant's voluntary trial testimony would be admissible on retrial and therefore can be relied upon to show the trial error is harmless.

However, the Court's further quotation of *Harrison* to reaffirm the prosecution's burden to show that use of an "unlawfully obtained" statement or confessions did not induce a defendant's trial testimony, suggests that *any* "unlawful" procedure in obtaining the statement or confession admitted triggers this burden, including a failure to give *Miranda* warnings.

Because *Elstad* left open this question, we ask the Court to resolve it.

B. If Applied To Mere *Miranda* Error, *Harrison* Is Inconsistent With *Elstad*.

Harrison relied upon the "fruit of the poisonous tree" doctrine to hold that not only the original, wrongfully obtained statements could not be used, but also the defendant's subsequent trial testimony:

> Here, . . . the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor.

Harrison, 392 U.S. at 220.

In *Elstad*, however, the Court ruled that the "fruit of the poisonous tree" doctrine does *not* require exclusion of a subsequent confession that was preceded by *Miranda* warnings and was voluntary. "[T]he *Miranda* presumption [of involuntariness], though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." *Elstad*, 470 U.S. at 307. The Court discussed

and applied *Michigan v. Tucker*, 417 U.S. 433, 444-45 (1974), saying:

> Since there was *no actual infringement of the suspect's constitutional rights*, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed. In deciding "how sweeping the judicially imposed consequences' of a failure to administer *Miranda* warnings should be, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony. The unwarned confession, of course, must be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.
>
> We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence *but the accused's own voluntary testimony*.

Elstad, 470 U.S. at 308 (emphasis added) (footnote omitted).

By ruling that a defendant's voluntary testimony is not the "fruit" of a noncoercive *Miranda* violation, and that its admissibility "should turn in these circumstances solely on whether it is knowingly and voluntarily made," *id.* at 309, the Court made plain that mere *Miranda* illegality in the procurement of an initial statement does not of itself prevent the admissibility of a later statement or testimony.

Hence, when the Court cited *Harrison* as precluding use of such testimony "[i]f the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling

the defendant to testify in rebuttal," *id.* at 316, it was necessarily construing *Harrison* as limited to circumstances where a Fifth Amendment violation has occurred, and not a mere *Miranda* violation.

C. The Admission In Evidence Of A Voluntary But Un*Mirandized* Statement Is Not Violative Of The Self-Incrimination Privilege.

Elstad, *Tucker*, and *New York v. Quarles* teach that the *Miranda* rules were created to further Fifth Amendment interests, but are not constitutionally compelled. A violation of the *Miranda* rules does not constitute a violation of the Fifth Amendment self-incrimination privilege, but is only a violation of rules adopted by this Court. *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. at 444.

Violation of the rules will generally bar evidentiary use of the un*Mirandized* statement, but not invariably. *E.g., New York v. Quarles*, 467 U.S. 649 ("public safety" exception); *Oregon v. Hass*, 420 U.S. 714 (1975) (impeachment); *Harris v. New York*, 401 U.S. 222 (1971) (same). The *Harris* Court said:

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. . . . It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

Id. at 224.

Were an un*Mirandized* statement obtained through coercion, its use even for impeachment would constitute a violation of due process and of the self-incrimination privilege, for in that case incriminating "testimony" of the defendant obtained by compulsion would be adduced against the defendant. *Estelle v. Smith*, 451 U.S. at 468 (self-incrimination); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (due process); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (same).

But where the un*Mirandized* statement in fact is uncoerced and voluntary in the traditional due process sense, see *Elstad*, 470 U.S. at 304-05; *Tucker*, 417 U.S. at 440-41, its admission in evidence, while unlawful, is not constitutional error violative of the Fifth Amendment privilege.

> "The *Miranda* exclusionary rule . . . *sweeps more broadly than the Fifth Amendment itself*. . . . Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has *suffered no identifiable constitutional harm*."

Elstad, 470 U.S. at 306-07 (emphasis added).

In *Tucker*, as here, the defendant was questioned while in custody but without full *Miranda* warnings. Although the defendant's statements were excluded from evidence at trial, the Court nonetheless considered whether he had been subjected to unconstitutional compulsory self-incrimination:

> A comparison of the facts in this case with the historical circumstances underlying the

> privilege against compulsory self-incrimination indicates that the police conduct here *did not deprive respondent of his privilege against compulsory self-incrimination* as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed.

Tucker, 417 U.S. at 444 (emphasis added). The Court determined "that the interrogation in this case involved *no compulsion sufficient to breach the right against compulsory self-incrimination* . . . ." *Id.* at 445 (emphasis added).

Similarly, in *Quarles*, the Court noted that "[t]he Fifth Amendment itself does not prohibit all incriminating admissions; '*[absent] some officially coerced self-accusation, the Fifth Amendment privilege is not violated* by even the most damning admissions.'" *Quarles*, 467 U.S. at 654 (emphasis added).

Hence, the admission in evidence of a voluntary, uncoerced, but un*Mirandized* statement, is error violative of *Miranda*, but it is not a violation of the self-incrimination clause of the Fifth Amendment.[3]

---

3. We do not overlook *Orozco v. Texas*, 394 U.S. 324, 326 (1969), in which, in a very brief opinion, the Court stated: "We . . . hold that the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*." This statement was unnecessary to the decision, in which the issue was whether *Miranda* precluded use of certain statements obtained without *Miranda* warnings. There was no question nor analysis of whether use of un*Mirandized* statements violated the Fifth Amendment, as distinct from *Miranda*. *Elstad*, *Tucker* and *Quarles* have answered that question to the contrary.

D. Under *Elstad*, The Prosecution Must Show That Trial Testimony Was Not "Impelled By," Or "Fruit" Of, A Defendant's Un*Mirandized* Statement Only When The Statement Was Coerced.

Elstad stated:

> If the prosecution has *actually violated the defendant's Fifth Amendment rights* by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison v. United States*, 392 U.S. 219 (1968), precludes use of that testimony on retrial. "Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Id.*, at 224-225.

Elstad, 470 U.S. at 316-17 (emphasis added).

The prosecution's burden of proving that a defendant's trial testimony was not impelled by an erroneous admission of a defendant's statement assumes that the trial testimony is or may be "fruit" of government illegality. *Harrison*, 392 U.S. at 222 ("the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor").

But in *Tucker* this Court "very clearly held" that *Wong Sun v. United States*, 371 U.S. 471 (1963), and its "fruit of the poisonous tree" analysis are "inapplicable in cases involving mere departures from *Miranda*." *Quarles*, 467 U.S. at 671 n.4. *Elstad* extended this ruling to "the accused's own voluntary testimony." 470 U.S. at 308.

Hence, no burden to show that a defendant's trial testimony was not the "fruit" of admission of the un*Mirandized* statement should apply where the error consists in admitting a voluntary but un*Mirandized* statement. To hold the prosecution to such a burden in cases of "mere departures from *Miranda*" is to resurrect the "fruit of the poisonous tree" doctrine under another label.

Where a coerced statement is admitted in evidence, the burden properly should apply. The defendant's due process rights and self-incrimination privilege are violated by the compulsion which produced the statement and its evidentiary use. "Thus, when the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's constitutional rights, *amounting to a denial of due process*, application of a broader exclusionary rule is warranted." *Quarles*, 467 U.S. at 672 (emphasis added).

"By contrast, where the accused proves only that the police failed to administer the *Miranda* warnings, exclusion of the statement itself is all that will and should be required. Limitation of the *Miranda* prohibition to testimonial use of the statements themselves adequately serves the purposes of the privilege against self-incrimination." *Id.* at 672.

Because the Fifth Amendment is not violated by the admission in evidence of an uncoerced statement, we submit that the Court's description of *Harrison* as applicable when prosecution "actually violated the defendant's Fifth Amendment rights" correctly limited *Harrison* to circumstances where a coerced or involuntary statement or confession has been admitted in evidence.

E. No Fifth Amendment Interest Is Furthered By Applying *Harrison* To Voluntary Statements Admitted In Violation Of *Miranda*.

Among the reasons given or suggested for excluding statements obtained in violation of *Miranda* are the goals of deterring police misconduct, protecting the adjudicative process from untrustworthy evidence, requiring the prosecution to "shoulder the entire load," and, more generally, vindicating the integrity of the judicial process. *E.g., Michigan v. Tucker*, 417 U.S. at 446-50 & 450 n.25.

Against these must be balanced "the strong interest under any system of justice of making available to the trier of fact"—and to the appellate courts in reviewing error—"all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id.* at 450.

Deterrent value. No deterrent purpose would be furthered by requiring the prosecution to prove that defendant's trial testimony is not "fruit" of the admission of her voluntary but un*Mirandized* statement. That interest is sufficiently served by *Miranda*'s requirement that failure to give the *Miranda* warnings must result in exclusion of the un*Mirandized* statement. *Quarles*, 467 U.S. at 672.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Tucker, 417 U.S. at 447.

Here, to require the prosecution to show that defendant's trial testimony is not "fruit" of the trial court's erroneous admission of her un*Mirandized* statement would apply an exclusionary rule to conduct of the police, prosecutor and trial judge that was "pursued in complete good faith."

The police interrogator, we reiterate, repeatedly told the defendant she was free to go, that she was not under arrest, and that she did not have to talk to him. There is no reason to think this was subterfuge: the cause of death was not yet known; the live birth of the baby was not yet established; there was no basis to arrest the defendant at that point.

The officer—and, ultimately, the prosecutor and trial judge—did not share the court of appeal's perception that a reasonable person might not feel free to leave notwithstanding these express assurances. It is on this "slippery" ground that defendant's statement became inadmissible. *Cf. Elstad*, 470 U.S. at 309.

The law "cannot realistically require that policemen investigating serious crimes make no errors whatsoever." *Tucker*, 417 U.S. at 446. Likewise, it cannot realistically assume trial judges will not sometimes, in the hindsight of appellate review, err in admitting a defendant's un*Mirandized* statement.

Requiring that in all such cases the defendant's trial testimony as well as the un*Mirandized* statement itself must be excluded not only would do violence to the principles laid down in *Elstad*, *Quarles*, and *Tucker*, but also would not significantly augment the deterrent effect that already exists through the *Miranda* requirement of exclusion of the un*Mirandized* statement itself.

Trustworthiness. Because both the un*Mirandized* statement and the defendant's trial testimony were entirely voluntary and essentially identical, there is no risk of introduction of untrustworthy testimony which the "normal

testing process of an adversary trial" is not adequate to reveal. *See Tucker*, 417 U.S. at 449.

Again, had the erroneously admitted pretrial statement been procured through coercion, there perhaps could be cause for concern that the defendant had accused herself falsely, and that she might in her trial testimony have adopted those falsehoods rather than be caught in them. *Cf. id.* at 448-449.

But where the un*Mirandized* statement was itself voluntary, no reason exists for suspecting it to be any less reliable than the usual defendant's statement. Its incriminatory and exculpatory content alike can be adequately tested through the adversary process at trial. Indeed, the decision of the defendant to testify reduces the danger of reliance on untrustworthy evidence, since her testimony and cross-examination can examine its making in detail. And, where her trial testimony is essentially identical to her pretrial statement, as here, she confirms rather than contests its reliability. She herself has vouched for it.

As in *Elstad*, "[w]hen neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." 470 U.S. at 312.

"Shoulder[ing] the entire load". One of the interests served by the Fifth Amendment and the *Miranda* rules is in preventing the unfairness perceived when the government "'in its contest with the individual [does not] shoulder the entire load'" by proving its case without resort to compulsory self-incrimination by the defendant. *E.g., Miranda*, 384 U.S. at 460; *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

Admission of the defendant's voluntary but un*Mirandized* statement violated *Miranda*, but, as we have shown, did not violate her Fifth Amendment privilege against self-incrimination. Although the State obtained

the benefit of evidence that should not have been admitted, it did not prove its case through compulsory self-incrimination by the defendant.

Whenever evidence is erroneously admitted, the proponent of the evidence presumably benefits. But mere evidentiary error has never been considered to violate a defendant's Fifth Amendment privilege or to require the prosecution to prove that the defendant's trial testimony is not the fruit of the evidentiary error. *E.g., United States v. Bohle*, 475 F.2d 872, 875-76 (2d Cir. 1973) (*Harrison* does not apply to mere hearsay evidentiary error); *Patton v. United States*, 688 A.2d 408, 411 (D.C. App. 1996) (same), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1717 (1997); *Towe v. State*, 801 S.W.2d 42, 43 (Ark. 1990) (same). Nor should mere *Miranda* evidentiary error trigger the *Harrison* exclusionary rule. *Elstad*, 470 U.S. at 308-09 (when the "alleged 'fruit' of a noncoercive *Miranda* violation . . . is the accused's own voluntary testimony," the *Wong Sun* "fruit of the poisonous tree" analysis does not apply).

Moreover, the *Harrison* exclusionary rule, invoked by requiring the prosecution to prove that defendant's trial testimony was not "fruit" of the erroneous admission of her un*Mirandized* statement, applies not to the pretrial statement but to the defendant's trial testimony. That testimony was unequivocally voluntary and not "compelled." By relying on that testimony in conducting a harmless error analysis, we rely on nothing that she did not herself voluntarily offer in evidence, with assistance of counsel, in the most coercion-free of forums, the courtroom itself.

Integrity of judicial process. Although "the imperative of judicial integrity" is sometimes cited as a reason to exclude evidence, the Court ruled in *Tucker*, 417 U.S. at 450 n.25, that it is "really an assimilation of the more specific rationales" discussed above, "and does not

in their absence provide an independent basis for excluding challenged evidence."

CONCLUSION

We therefore ask the Court to grant to writ of certiorari.

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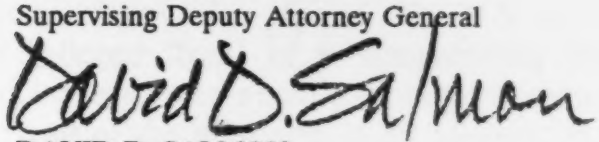
Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General



DAVID D. SALMON
Deputy Attorney General
Counsel of Record

Counsel for Petitioner